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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1374

MAURICE A. GELLIS,
Petitioner,

against

CITY OF SAVANNAH, CHATHAM COUNTY, GEORGIA; J. CURTIS LEWIS, JR., Mayor, BENJAMIN M. GARFUNKEL, Mayor Pro Tem, W.T. GAUDRY; EDWARD A. PERKINS, J.M. STUBBS, and JOSEPH R. MYATT, Aldermen, CITY OF SAVANNAH, constituting the CITY COUNCIL, CITY OF SAVANNAH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Maurice A. Gellis, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the case on February 29, 1972, affirming the order of the District Court entered on July 9, 1971.

Opinions Below

The Court of Appeals for the Fifth Circuit affirmed the order of the United States District Court, without opinion. A copy of the order of affirmance is printed as Appendix A. The order and opinion of District Court is not yet reported. A copy thereof is printed as Appendix B.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on February 29, 1972, and a copy thereof is printed as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and § 2101 (c) and Rule 19.1 (b) of this Court.

Questions Presented

1. Whether the Savannah, Georgia Zoning Code, is *ultra vires*, arbitrary, unreasonable and discriminatory, in that it was not made in accordance with the Georgia General Planning Enabling Act of 1957, as applied to the subject premises, denies to any person, the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the Savannah, Georgia "Planned Office Center District" (P-O-C) zoning ordinance, Savannah Zoning Code § 38-122.2, as applied to the subject premises, the only parcel in the City so zoned, denies to any person the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the municipal actions taken by the Savannah Metropolitan Planning Commission (MPC), in blocking the issuance of a building permit for office and apartment buildings without a zoning change and the later action taken by the

Savannah City Council, in denying petitioner's application for rezoning and the right to obtain a building permit for offices and apartment buildings, violated petitioner's federal constitutional and statutory rights.

4. Whether the refusal by the City of Savannah to grant to Petitioner a building permit or rezoning for offices, apartments or any other residential or commercial uses, while granting zoning and building permits to others for such uses in areas surrounding the subject premises on the west, south and east, and in various other parts of the City, constitutes illegal discrimination and a denial of the equal protection of the laws and due process of law, in violation of the Fourteenth Amendment.

5. Whether it was error and an abuse of discretion for the District Court to allow summary judgment to respondents on the conspiracy allegations, which involve factual issues intended to be developed in a jury trial, in view of petitioner's demand for a jury trial on the issue of damages under the second cause of action and in view of the specific understanding and agreement reached between the Court and counsel during the hearing on the motions for summary judgment, by which the motions for summary judgment were to be limited to the first cause of action, with the matter of liability and damages to be postponed for a later jury trial.

6. Whether it was error, an abuse of discretion and a judicial impropriety, under all of the circumstances of this case, for the judge of the District Court to *overrule* the Petitioner's motion for summary judgment pursuant to Rule 56, while granting respondents' (cross-)motion for summary judgment and dismissing the complaint. In so doing, the Court overlooked the fact that respondents failed to show the absence of a genuine issue concerning any material fact. The Court, in accepting the affidavits of the respondents for two purposes—1) for use in opposition to petitioner's motion for summary judgment and 2) for use in support of the motion for summary judgment of the respondents—thereby overlooked the fact that petitioner's Supplemental Affidavit showed that none of the affidavits upon which respondents relied met the specific requirements of

Rule 56(e), since the affidavits contained mere denials of the allegations in the complaint and the petitioner's motion for summary judgment. The Court of Appeals affirmed, without opinion.

7. Whether it was error, an abuse of discretion and a judicial impropriety, under all of the circumstances in this case, for the judge of the District Court, after participating as a member of his former law firm, in the negotiations on behalf of a client for a contract of purchase of the subject property on March 22, 1962, which failed to protect the best interests of such client under the new P-O-C zoning ordinance, by leaving the property unsaleable for any commercial office uses in the face of outstanding deed restrictions of record against commercial uses, and then taking part as a District Judge in the instant case, involving the petitioner's complaint against the constitutional invalidity of the P-O-C zoning ordinance, after petitioner secured a title policy insuring against all outstanding restrictions of record.

Constitutional Provisions, Federal Statutes and Rules, State Laws and Zoning Ordinances Involved

The constitutional provisions involved are the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution. The federal statutes and rules involved are the Civil Rights Act, 42 U.S.C. § 1983 and § 1985 (3), Rules 26, 56 and 57 of the Federal Rules of Civil Procedure and "A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations," recommended by the U.S. Department of Commerce, 1926. The Georgia statutes and local zoning ordinance provisions involved are the Georgia General Planning Enabling Act (Georgia Laws 1957, p.420, *et seq.*, as amended) and the Savannah, Georgia City Code (Zoning). Pertinent statutory provisions are printed in Appendix D.

Statement of the Case

On September 12, 1969, after obtaining a title policy in-

suring against outstanding deed restrictions of record prohibiting sales or rentals to any person not of the white race or any commercial uses, the petitioner entered into a contract of purchase and sale with Savannah Electric and Power Co. (Electric Co.) to acquire 7.42 acres of vacant unimproved land in the City of Savannah. The contract was conditioned upon petitioner applying for and obtaining variances and modifications in the existing P-O-C zoning of the land, by means of an appeal to the Board of Zoning Appeals, to permit the construction of office and apartment buildings on the site, which is bounded on all four sides by public streets and does not abut any single family residential property.

Background of the P-O-C zoning ordinance.

On July 29, 1960, the City of Savannah, Georgia, enacted its present City Zoning Code, purporting to act pursuant to the provisions of the Georgia General Planning Enabling Act (Ga. Laws 1957, p. 420, as amended and as codified in Chapter 69-12 of the Georgia Code Annotated). The Georgia Enabling statute, like the State zoning enabling acts in 43 other states, have followed the provisions of "A Standard State Zoning Enabling Act," recommended by the U.S. Department of Commerce, 1926.

On March 22, 1962, respondent Lewis, through the J.C. Lewis Motor Company, Inc. (Lewis Co.) contracted to sell the subject property, then zoned for single family residential uses, to the Electric Co. for use as a general office and sales building, with the seller agreeing to obtain rezoning at a cost of $1,000.

The contract had a re-purchase option in favor of the Lewis Co. in the event that the Electric Co. elected to sell the land or use it for a purpose other than the erection of a general office and sales building for its utility business. The option was to cease upon the death of J.C. Lewis and all of his children "now in life." Excerpts from said agreement, a copy of which is attached as Exhibit 2 to the complaint, are printed as Appendix E.

The Lewis Co. petition to rezone the subject site to B-G

(General Business, which permitted heavy commrecial and certain industrial-like uses) was denied by the MPC Staff on March 29, 1962. The MPC then recommended the P-O-C zoning ordinance, to permit the office uses requested by Lewis for the Electric Co., which was adopted especially for the subject land only, by the City Council on May 16, 1962, and the land remains as the only property so zoned in the City. Excerpts from the P-O-C zoning ordinance are printed in Appendix D.

The Electric Co. did not use the property as originally planned. In October, 1963, after obtaining a release of the re-purchase option reserved by Lewis, for $4.00, the Electric Co. discovered that the property was unsaleable for any uses, due to the P-O-C zoning and to the outstanding deed restrictions of record. All efforts to sell the land for offices or for the abnormal uses permitted, numbered 3 to 11, which were uses for governmental agencies or charitable institutions, failed to attract a private investor or developer until the petitioner executed his contract on September 12, 1969.

The MPC Meeting of January 22, 1970.

Pursuant to the requirements of the P-O-C zoning ordinance. petitioner submitted a well-prepared site development plan for approval of a sub-committee of two members of MPC, for office and apartment buildings, before a building permit could be issued by the zoning administrator, who also was the building inspector. The petitioner's plans were not considered after two city employees, the zoning administrator and the City's planning director, interrupted the meeting by engaging in a series of questions and answers, which concluded by the announcement that "apartments are not a permitted use in the P-O-C zone." One of the two MPC members, who was standing by during the colloquy, then offered the opinion that petitioner would have to rezone the P-O-C property to obtain a permit for office and apartment buildings on the site.

The MPC "Regular Public Meeting" held February 17, 1970.

On February 17, 1970, the petitioner and his New York arch-

itect appeared in Savannah a second time at the regular public meeting of MPC for the purpose of re-submitting the site plans to the full 12 members of the Chatham County-Savannah MPC for approval before a building permit could be issued.

After reading a lengthy MPC Staff report, the planning director recommended that petitioner's "proposal should be rejected by the MPC as having no standing before the Commission since uses are proposed which are not permitted in the P-O-C district."

The highlights of the planning director's report, included the following two matters:

1) Reference is made to the letter from the planning director dated February 16, 1970, to a member of MPC, which stated, in part, as follows:

"Therefore, in my capacity as Planning Director, I recommend neither the Committee, nor the Commission, consider any of the merits of the proposal, but reject the proposal as having no standing before either the Committee or the Commission, until such time as the developer accomplishes rezoning of the property, achieve a text amendment or submit plans which fully comply with existing requirements of the City Zoning Ordinance. (It would, in my opinion, be improper for the Committee or the Commission to sanction apparent violations of the Savannah City Code.)"[1]

2) In answer to a question from the planning director set forth in his letter to an assistant city attorney, dated February 10, 1970, "Are 'luxury apartments' or multi-family dwellings permited uses in the P-O-C district?", the attorney replied on February 13, 1970, in part, as follows:

"1. Code Section 38-122.2, paragraph 11, Savannah City Code makes no provisions for luxury apartments or multi-family dwellings unless it could be construed as a home for

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1. The use of the form provided by the City of Savannah makes the application for rezoning and for a text amendment the same. § 38-173.

> the aged and for children. My legal interpretation of that means strictly homes for the aged and for children, and *in my opinion would not include any high rise apartment building open to anyone as a tenant.*" (Italics supplied.)

By using the procedure of having MPC present their opposition to petitioner's proposal before hearing from petitioner, it was self-evident that MPC was proceeding in accordance with a prior understanding set forth by the City Administration, headed by respondent Lewis, to block the petitioner by having MPC follow the recommendations of the planning director to reject the submitted site plan without any discussion of the proposal on the merits.

Petitioner, nevertheless, succeeded in making a partial record by introducing several documents in evidence, including copies of two recent decisions made by the City's Board of Zoning Appeals, each of which granted building permits for "high-rise apartment buildings for the elderly," 15 and 20 stories in height, in residential areas. Petitioner introduced a partial plat showing the subject premises and surrounding areas, marked to show zoning on the west, on the south and on the east which permitted office and apartments—all of which were owned or formerly owned by respondent Lewis, who also owned the vacant R-6 (single family residential) zoned land on the north and northeast. The new zoning on the south and the east had been obtained after the sale of land to the Electric Co. in 1962. (Exhibit 5, attached to complaint.)

Petitioner urged that the P-O-C use No. 6, "Homes for the aged and for children" was, in reality, an illegal zoning classification which excluded traditional families by the strict interpretation which attempted to limit and segregate the so-called "special apartments" according to age groups. Excerpt from affidavit of planning director is printed as Appendix F. Petitioner explained that "homes for the aged" was of the same character and class as "high-rise apartments for the elderly," and that if the city allows apartments for one developer, they should treat the petitioner in the same fashion. Petitioner pointed out that the Board of Zoning Appeals granted building permits for the

"apartments for the elderly," although the Zoning Code did not authorize such apartments and that the Georgia State Enabling Act made no mention of such apartments "only for the elderly." Petitioner noted that the only differences between the apartments for the elderly and those proposed are the construction and design features and the financial status of the tenants and that under the circumstances, the City may not legally discriminate in the types of housing or apartments which may be permitted in Savannah, based upon color, race or the economic status of future tenants. In addition, petitioner observed that since the housing needs of the elderly were being taken care of in Savannah, through the auspices of the Federal Government, that the City had no compelling reason or legitimate interest in requiring that the subject property be kept in reserve for some future need for the use, "Homes for the aged and for children." Petitioner concluded by saying that he was unable to find any such combined uses anywhere in the United States.

The MPC voted to reject the petitioner's site development plan for office and apartment buildings "as having no standing before this Commission," the exact reason previously furnished by the planning director in his letter dated February 16; 1970.

One of the questions presented for review in this petition arises out of the refusal of the Savannah MPC to approve petitioner's site plan, thereby automatically blocking the right of a prompt State Court review, a right granted by the Georgia Zoning Enabling Law, but deleted by the City of Savannah in enacting the Savannah Zoning Code in 1960 and the P-O-C zoning ordinance in 1962.

The City Council's "public hearing" held May 1, 1970.

On February 26, 1970, petitioner filed an application for rezoning the property to permit the office and apartment buildings shown on the original site plan, using the city form for a "text amendment," under § 38-173 of the Code. All such applications were sent to MPC for "review and recommendation," as provided in the Code, with predictable results.

On March 17, 1970, the MPC Staff recommended that the re-

zoning application transmitted from the City Council, be denied.

As an *alternate solution*, the MPC Staff recommended to the members of MPC that they should recommend that the City Council should rezone the property from the P-O-C zoning ordinance to the existing "R-I-P" zone, which "would automatically permit all of the uses which petitioner has indicated he wishes to establish. The purpose of the R-I-P district is to create an area in which residential, institutional and professional uses can be intermixed and at the same time to achieve a healthful living environment." (Exhibit 16, annexed to complaint.)

The MPC ignored the Staff recommendations to rezone the property to the R-I-P zone and denied the rezoning application by 8 to 2, with one abstention.

The petitioner's rezoning application came on for a hearing before the City Council, with respondent Lewis presiding as Mayor, in spite of his obvious conflict of interest, as the developer of the small Habersham Woods colony north of the subject site, a resident of the colony and the person who obtained the P-O-C zoning to complete the sale of the land to the Electric Co. in 1962.

After the petitioner made his presentation, without interruption, the executive director of MPC summarized the recommendations of the Staff dated March 17, 1970, and that of the MPC on March 24, 1970, which recommended that the application be denied. The Mayor then called upon Attorney John Simpson, representing the Habersham Woods association, who handed the Mayor and each of the five Aldermen, a piece of paper, describing it as a petition of Habersham Woods residents who were opposed to the rezoning. He then made a statement in opposition and did not call any of the residents in the room to testify against the rezoning. The petitioner made a reply, but was not shown a copy of the petition handled by Mr. Simpson. All efforts to see a copy or to obtain a copy failed. It must be assumed that the Mayor and staff have suppressed the "paper," which the Court below treated as documentary evidence introduced by an adversary.

Before voting on the petition, respondent Gaudry stated,

"that when rezoning is involved, it has been the *policy* of Council to meet the desires of the residents in the area wherever possible." (Italics supplied.) By a unanimous vote the City Council denied the petition to rezone the property.

Another question presented for review in this petition arises out of the alleged illegal action taken by the Savannah City Council, with respondent Lewis presiding, in rejecting the petition for rezoning the subject property for office and apartment buildings, in the face of such rezoning obtained by respondent Lewis for his own properties surrounding the subject site on the west, the south and the east.

Under the P-O-C zoning ordinance and the Savannah Zoning Code, the petitioner was denied the right to appeal as an "aggrieved person" from any order, requirement, decision or determination made by an administrative officer to the Savannah Zoning Board of Appeals, and thereby was denied the right to a prompt judicial review by the Georgia Superior Court, as authorized by the provisions of the Georgia Zoning Enabling Act.

The action commenced in the District Court, Savannah, Georgia

The petitioner, therefore, commenced this action in the United States District Court to obtain declaratory, injunctive and other relief against the *ultra vires* and unconstitutional P-O-C zoning ordinance for violations of the Fourteenth Amendment and the Civil Rights Act.

The gravamen of the complaint was that the actions of the City officials prevented the petitioner from making any use of the property for offices or for apartments, or any other residential or commercial uses, and that the strict enforcement of the P-O-C zoning ordinance would destroy the entire value of the property.

The complaint alleges that affirmative acts by the City Officials were taken under color of the alleged unconstitutional zoning classification to inhibit the petitioner's constitutional and statutory rights.

At no time did any city officials or employees state, claim or demonstrate that the P-O-C ordinance served any compelling

municipal interest or that it provided any legitimate benefit to satisfy any special need of the city. There was no effort made to offer any prospect of some real alternative or a practical use for the property, in the face of a barren future, with no opportunity for some zoning modifications or a compromise from adamant city officials.

On June 30, 1970, the petitioner filed and served a notice of motion for summary judgment with a supporting affidavit, for a hearing on July 14, 1970, in the District Court in Savannah.

On July 10, 1970, the respondents filed their opposition to petitioner's motion for summary judgment, together with a set of supporting affidavits and mailed a copy to petitioner in Harrison, New York, which was received by him upon returning from Savannah on July 16, 1970.

While the hearing on the petitioner's motion for summary judgment in Savannah should have been a routine matter, the following incidents were irregular and have given petitioner cause for great concern as to whether he was given a full and fair hearing:

On July 14, 1970, while petitioner was proceeding with his argument before the Court, one of the attorneys for respondents served their incomplete and unsigned (cross) motion for summary judgment to dismiss the complaint, without affidavits attached, but with reference to the set of affidavits sent with their opposition mailed to New York on July 10, 1970. This was in violation of Rule 56, and as a result petitioner had to request time to reply;

On July 14, 1970, at the start of the hearing, Judge Alexander A. Lawrence, presiding, observed that this case involved contracts which had been negotiated by his former law firm. Petitioner had no knowledge of the judge's past associations before his elevation to the bench, and, therefore, he had no reason to believe that the judge's past associations might disqualify the judge from hearing and deciding the case.

In view of the later facts discovered by petitioner, however, he now believes that Judge Lawrence had a duty on July 14, 1970, to disclose all relevant matters bearing upon his

relationship with the law firm of Bouhan, Lawrence, Williams, Levy and McAlpin, which had represented the Electric Co. in the 1962 and the participation by Judge Lawrence and his law partners in the contract negotiations with respondent Lewis and his attorneys, involving the P-O-C ordinance, the re-pruchase option and the failure to obtain title insurance against the deed restrictions of record.

In 1969 and 1970, the Electric Co. in its negotiations with the petitioner was represented by the law firm of Bouhan, Williams and Levy, successors to the former firm.

At no time until after the hearing on July 14, 1970, did anyone associated with the Electric Co. or the law firm of Bouhan, Williams & Levy disclose that Judge Lawrence had been a member of the law firm of Bouhan, Lawrence, Williams Levy and McAlpin in 1962.

It now appears that Judge Lawrence and/or his law firm, as the attorneys for the Electric Co. in 1962, not only carried on all contract negotiations with respondent Lewis, his corporations and attorneys, but also approved the contract dated March 22, 1962, between Savannah Electric and Power Co. and J.C. Lewis Motor Company, Inc. for execution and signature by the Electric Co.

Petitioner is of the opinion that the aforesaid contract left the Electric Co. completely unprotected in the event that it did not use the property for its new general office and sales building for its utility business.

In view of these circumstances, it is the opinion of the petitioner that it was improper for Judge Lawrence to hear and decide this case in 1970, since the complaint had challenged everything which Judge Lawrence and his former law firm had approved as counsel for the Electric Co., namely, the 1962 contract between the Electric Co. and Lewis Co., which conveyed to the Electric Co. unsaleable property, subject to outstanding deed restrictions of record against commercial uses and spot zoned for the benefit of respondent Lewis under the new and restricted P-O-C zoning ordinance, which the complaint in the case at bar had challenged as *ultra vires* and unconstitutional.

On July 14, 1970, Attorney Sognier on behalf of respondent Lewis, contended that petitioner had no interest in the subject premises when the action was commenced, and he therefore asked the Court to dismiss the complaint. This issue had not been raised in the filed papers by respondents.

When petitioner offered to exhibit a copy of his contract to the Court, the Court refused the offer. The Court then requested petitioner to notify the Court, within one week, whether petitioner would make a copy of the contract available to Mr. Sognier. On July 28, 1970, petitioner filed a Supplemental Affidavit, explaining his reasons for declining to make the contract available to Mr. Sognier.

Thereafter, on July 31, 1970, the Court, *ex parte*, directed the respondents' attorneys to schedule the taking of a discovery deposition of the Electric Co., with a subpoena to produce and photograph the contract in question, pursuant to Rule 26. This was done on August 10, 1970, over petitioner's written protest. It was in violation of Rules 26 and 56. (Petitioner's Reply Brief in the Court of Appeals covers this matter in Point V, p. 12, *et seq.*)

On July 14, 1970, at the request of the Court to divide the case into separate parts, to permit some early decisions, the petitioner made the suggestion that his motion for summary judgment could be limited to the first cause of action and that the issue of liability and damages in the second cause of action could be postponed for a later jury trial in accordance with petitioner's filed demand for a jury trial on the issue of damages. The Court and counsel agreed to proceed in accordance with the foregoing suggestion.

The respondents' Brief filed July 21, 1970, did not follow the agreement by discussing the second cause of action as the first point. Petitioner's Reply Brief and the Supplemental Affidavit were directed to the first cause of action only. The Court's order and opinion filed on July 9, 1971, in ruling on the entire case, was in violation of the aforesaid agreement between the Court and counsel and was unfair and erroneous. (Petitioner's Brief in the Court of Appeals, Point IV, pp. 51-54.)

On July 14, 1970, petitioner was granted permission to answer the respondents' opposition affidavits which were also used to support their Cross motion for summary judgment. The Supplemental Affidavit filed July 28, 1970, clearly noted the deficiencies in the materials submitted by respondents in opposition to petitioner's motion for summary judgment and in support of respondents' cross motion. Petitioner, therefore, urged in the District Court and in the Court of Appeals, that respondents' affidavits had failed to meet the specific requirements of Rule 56 (e), and that under the circumstances all of the evidence submitted by respondents was unacceptable for their opposition to the petitioner's motion and could not support the cross motion for summary judgment. (Supplemental Affidavit, C.A. App., A-71-A-73; A-75-A-87.)

The petitioner appealed to the Court of Appeals for the Fifth Circuit, which affirmed the order of the District Court, without opinion.

Reasons For Granting The Writ

The issues in this case are of far-reaching public interest and importance in many states which have urban housing problems under local zoning ordinances. The decision of the Court of Appeals, in affirming the order and decision of the District Court, was clearly erroneous and in conflict with the decisions of the Courts of Appeal in three circuits, in matters of municipal zoning which is arbitrary, unreasonable, invalid and unconstitutional. The Court of Appeals has decided an important state question in a way in conflict with the applicable Georgia law and the general weight of authority among more than 40 states which have enacted state zoning enabling acts patterned after the Standard State Zoning Enabling Act, recommended by the U.S. Department of Commerce in 1926. The Court of Appeals has decided important questions of federal law, involving property rights under the Fourteenth Amendment of the Constitution, the Civil Rights Act and the provisions of Rule 56, F.R.C.P., in a way in conflict with applicable decisions of this Court.

The Georgia General Planning Enabling Act of 1957 (Ga. Laws 1957, p. 420, as amended), like those in other states with similar enabling acts, provides safeguards for the rights of individual property owners, inhabitants and taxpayers of municipalities, by insuring that all municipal zoning ordinances "shall be made in accordance with a comprehensive plan (§ 69-1207); that administrative appeals may be taken to the Board of Zoning Appeals by any "person aggrieved" from "any order, requirement, decision, or determination made by an administrative official in the enforcement of any ordinance" (§ 69-1211) and that "any person . . . aggrieved by any decision of the Board of Zoning Appeals may take an appeal to the Superior Court" for a prompt judicial review (§ 69-1211.1).

The City of Savannah and many other municipalities in Georgia and throughout the country, have failed to include the above basic protective measures before enacting their zoning codes pursuant to their respective state zoning enabling acts. Thus, in Savannah the rights of "aggrieved persons" are restricted by the Zoning Code to administrative appeals from decisions made only by the zoning administrator, who is the building inspector. The Savannah Zoning Code has no provision for appeals from adverse decisions made by the Metropolitan Planning Commission (MPC), or from adverse decisions made by the Board of Zoning Appeals to the Superior Court.

The Savannah Zoning Code, by failing to provide for appeals in *all* cases for *all* property owners, and by failing to provide for a prompt judicial review to the State Superior Court open to all persons, has rendered the Zoning Code *ultra vires* of the Georgia Enabling Act of 1957.

In the absence of State supervision over municipalities to determine whether there is actual compliance with the requirements of state enabling acts, Savannah and other municipalities are able to by-pass the state enacted safguards to sanction violations of municipal land use control programs, with the result that widespread abuse, arbitrary and unreasonable acts of discrimination and illegal acts have been perpetrated under the

334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, holding unconstitutional the judicial enforcement of restrictive covenants contained in deeds, and Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed. 2d 830, holding unconstitutional an initiated amendment to the California constitution effectively permitting discriminatory practices in the housing market."

When the case at bar reached the Fifth Circuit, petitioner made reference to *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y., 1970), aff'd 436 F. 2d 108 (2 Cir., 1970), cert. den. 401 U.S. 1010. The Court of Appeals (Clark, J. retired), in referring to the discriminatory municipal actions beyond the scope of the authority of the mayor and city council, said (p. 114):

"The plaintiffs sought to exercise their constitutional right of 'freedom from discrimination by the States in the enjoyment of property rights.' Shelley v. Kraemer, 334 U.S. 1, 20, 68 S.Ct. 836, 845, 92 L.Ed. 1161 (1948). The effect of Lackawanna's action was inescapably adverse to the enjoyment of this right. In such circumstances the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality. Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969). The City has failed to demonstrate an interest so compelling. None of the planning experts had recommended that the acreage included in the ordinance be unavailable for residential use. Nor did either of the Master Plans so specify."

In *Shenk v. Zoning Commission of D.C.*, 440 F.2d 295 (D.C. Cir. 1970), the action by the Zoning Commission, in denying the application for rezoning land for apartments, was held to be arbitrary, capricious, invalid and unconstitutional, having no substantial relations to the general welfare, in view of the fact that the Commission had granted several prior approvals for apartments in the same area over the same objections, that new apartments would overtax public facilities.

The Court said (297-298):

"when a complainant makes a factual showing indicating that one of its actions is arbitrary that action cannot be sus-

tained unless the Commission puts forward, or the court is otherwise able to discern, some basis in fact and law to justify the action as consistent with reasonableness. Neither the district court nor this court could perceive such a basis. Accordingly the judgment is

Affirmed."

See: *Nectow v. Cambridge*, 227 U.S. 183, 188-189 (1928).

Since the decision of the Court of Appeals, Fifth Circuit, in affirming the order and decision of the District Court for the Southern District of Georgia, is in conflict with the decisions of the Courts of Appeal for the Second, the Tenth and the District of Columbia circuits, in the matter of zoning and property rights involving housing in urban areas, this Court should settle the question whether "all persons" and "any person," without regard to race or color, are to be treated equally, within the meaning of the Fourteenth Amendment of the Constitution of the United States and the Civil Rights Act, 42 U.S.C. § § 1983, 1985.

II

The Court of Appeals, by affirming the order and decision of the District Court, has ruled on an important state zoning question, which is in conflict with the law of Georgia and the weight of authority among the states which have adopted zoning enabling acts patterned after the Standard State Zoning Enabling Act.

The District Court, after stating that no federal cases were found in support of the petitioner's contention that the P-O-C was "spot zoning" and illegal, concluded, "This 'spot zoning' [in 1962] was not a denial of due process in the light of the changing character of the neighborhood and the lack of injury to the health and welfare of the community." Appendix B, pp. 13a-14a. *infra.*

Under the Georgia rule, the 1962 "spot zoning" of residential land for business uses for respondent Lewis would be regarded as *ultra vires* and invalid for the reason that it was zoning that was not "made in accordance with a comprehensive plan," as required by the Georgia enabling act (§ 69-802; § 69-1207). *Orr*

v. Hapeville Investments, Inc., 211 Ga. 235, 85 S.E. 2d 20 (1954); *City of Atlanta v. East Point Amusement Co.*, 222 Ga. 774, 152 S.E. 2d 374, 377 (1966). The weight of authority is in accord with the rule in Georgia. *Waterville Hotel Corp. v. Bd. of Zoning Appeals*, 241 A. 2d 50, 54 (Sup. Jud. Ct. Me., 1968); *Udell v. Haas*, 21 N.Y. 2d 463, 469-470 (1968); *Page v. City of Portland*, 168 Ore. 632, 165 P. 2d 280 (1946); *Smith v. Skaget County*, 453 P. 2d 832 (Sup. Ct. Wash., 1969); *Hinman v. Planning & Zoning Comm.*, 26 Conn. Sup. 125, 214 A. 2d 131 (1965); *Keppy v. Ehlers*, 115 N.W. 2d 198 (Iowa, 1962).

In 1962 there had been no "changed conditions" in the neighborhood to justify rezoning of the single-family residential land for the business uses requested by respondent Lewis. All of the land east of Abercorn Street was in the R-6 zone as shown by the MPC Staff report dated March 29, 1962. C.A. App. A-104-106, Exh. 2a.

The complaint alleges and the evidence shows that major "changed conditions" occurred *after* May, 1962 and were continuing in May, 1970, when this action was commenced, in the area surrounding the subject site, with respondent Lewis obtaining rezoning on the south and on the east of the site to permit office and apartment uses. C.A. App. A-117, Exh. 5. There were changes in various parts of the City and in Chatham County, south of the City where Abercorn Street was named "Abercorn Extension." C.A. App. A-39, A-128, A-129, Exhs. 11, 12. In view of the many changes and new projects being developed, the continued application and strict enforcement of the P-O-C zoning ordinance as to the subject site was arbitrary and unreasonable, causing the property to remain vacant and undeveloped in the face of opportunities to use the property for offices and apartments. The complaint to invalidate the P-O-C zoning ordinance, therefore had to be tested by the facts and circumstances existing in 1970 when the zoning ordinance was questioned, rather than in 1962. *Tuggle v. Manning*, 224 Ga. 29, 159 S.E. 2d 703 (1968); *Opgal v. Burns*, 20 Misc. 2d 803 (Sup. Ct. Nassau Co., 1959), aff'd 10 A.D. 2d 977; aff'd 9 N.Y. 2d 659 (1961); *Udell v. Haas*, 21 N.Y. 2d 463, 469, 476 (1968); *Corthouse v.*

Town of Newington, 140 Conn. 284, 99 A.2d 112 (1953).

Under the circumstances the P-O-C zoning ordinance was preferential treatment for respondent Lewis in 1962. It was invalid, discriminatory and unconstitutional in its application to the subject property in 1970, within the meaning of the equal protection and due process clauses of the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. §§ 1983, 1985.

This Court should grant this petition for certiorari to clarify the administration and interpretation of the zoning laws for urban housing involved in this case.

III

The Court of Appeals, in affirming the order and decision of the District Court appears to have decided important questions involving zoning and property rights for urban housing, in conflict with the decisions of this Court in the application of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Specifically, the District Court stated:

> "Plaintiff relies heavily upon *Dailey v. City of Lawton, Okla.*, 296 F. Supp. 266, aff'd 425 F. 2d 1037, in which the refusal to rezone by the Metropolitan Area Planning Commission and the City Council denied Negroes and other minority groups their constitutional right to live in the proposed low-rent housing project. This case involves racial discrimination and for that reason is distinguishable from the case at bar." Appendix B, p. 13a.

It is respectfully submitted that this Court should review the following question presented by this case:

> "Does the Equal Protection Clause guarantee the rights of Negroes only, as the District Court held, or does the Equal Protection Clause apply to 'all persons' and to 'any person' without regard to race or color, in all matters of housing and property rights under local zoning ordinances anywhere in the United States?"

IV

The Court of Appeals, in affirming the order and decision of the District Court, is in conflict with the applicable decisions of this Court in the matter of summary judgment pursuant to Rule 56 (e), F.R. C.P.

One of the important questions presented by this petition is whether the District Court erred when it ruled that:

> "The motion for summary judgment filed by the defendants is granted and the complaint dismissed. Plaintiff's motion for summary judgment is *overruled.*" (Italics supplied). Appendix B, pp. 15a-16a.

On June 30, 1970, petitioner filed and served a motion for summary judgment, with a supporting affidavit, for a hearing on July 14, 1970. C.A. App., p. A-35, A-36.

On July 14, 1970, respondents served petitioner with a (cross-) motion for summary judgment, in Court, without affidavits. C.A. App., p. A-196, 198.

On July 16, 1970, petitioner received respondents affidavits mailed to him in New York, which had been filed on July 10, 1970.

On July 28, 1970, petitioner filed and served a Supplemental Affidavit in reply to respondents' opposition to petitioner's motion and in opposition to respondents' motion for summary judgment. The affidavit pointed out that all of the affidavits of respondents were made by respondents personally, by co-conspirators, city employees and a resident of Habersham Woods colony, and that each affiant was motivated by his own self-serving interests and that each was lacking in facts stated and were not impartial or expert witnesses. The statements in the main were denials of the allegations in the complaint and in the petitioner's affidavit, and, as such, were not statements of facts admissible in evidence. None of the affiants could show affirmatively that they were competent to testify as to any substantial matter stated in their affidavits. C.A. App., Vol. I, pp. A-75-87.

Thus, petitioner demonstrated, in detail, that none of the materials submitted by respondents in support of their own motion for summary judgment, or in opposition to petitioner's

motion, met the requirements of Rule 56 (e), as amended in 1963. The respondents failed to meet the burden of showing "that there is no genuine issue as to any material fact . . . ". It follows that "where the evidentiary matter in support of a motion does not establish the absence of a genuine issue, summary judgment must be denied, even if no opposing evidentiary material is presented." *Adickes v. Kress Co.*, 398 U.S. 144, 160 (1970). The petitioner submits that the District Court erred in granting the respondents' motion for summary judgment.

The petitioner further submits that the complaint, the affidavit in support of the motion for summary judgment and the supplemental affidavit did show that there was no genuine issue as to any material fact and that the District Court should have granted the petitioner's motion for summary judgment on the substantive issue of the validity of the P-O-C zoning ordinance.

In failing to deny the petitioner's motion, the court was in error to "overrule" the motion. If there had been a denial, the petitioner would have been entitled to a trial on the issues in the case.

Insofar as the second cause of action is concerned, the District Court and counsel for the parties on July 14, 1970, in open court entered into an understanding and agreement, to permit some early decisions by the Court, and to postpone the issues of liability and damages for a later jury trial in accordance with petitioner's filed jury demand. Petitioner submits that it was error for the Court to consider the entire case and, in addition, to dismiss the complaint. See: Plaintiff's Reply Brief in the District Court, p. 1; Petitioner's "Brief for Appellant," in Court of Appeals, Point IV, p. 51, and C.A. App., p. A-88. If there were fact issues remaining in the case, they would be for the jury to decide. *Adickes v. Kress Co.*, supra, p. 176 (Black, J. concurring in the judgment).

V

As a result of the discovery of the past associations of District Judge Alexander A. Lawrence in the 1962 contract negotiations

for the acquisition and rezoning of the subject premises involving dealings with respondent Lewis and his attorneys, petitioner's opinion is that it was improper for Judge Lawrence to take part in the 1970 judicial proceedings and later decision in this case. This conclusion is made apparent by the fact that the complaint sought to invalidate the P-O-C zoning ordinance and to obtain damages from the individual defendants under 42 U.S.C. § 1985.

The 1962 contract gave Mr. Lewis the consideration for the sale, while permitting him to carry out his personal restrictive plans as set forth in his re-purchase option in the contract. The Electric Co. was left unprotected after it had parted with its money and decided not to use the land. It found that the property was unmarketable because of the P-O-C zoning and the Lewis-imposed deed restrictions which were in effect.

The record, as printed in the four volumes of the Court of Appeals Appendix, shows that the petitioner's proposal had not been considered on the merits by MPC or by the City Council.

The written opinion of the District Court shows, that after the judge made rulings apparently in favor of petitioner, he decided to rule against petitioner in order to be consistent with his 1962 posture regarding the subject property and the P-O-C zoning ordinance.

The District Court, in a single paragraph of his opinion, in the absence of any evidence presented agains the petitioner at the so-called "public hearing" held on May 1, 1970 (C.A. App., pp. A22-25); 1) injected his own facts concerning "greatly increased traffic, noise and pollution on Abercorn Street so as to pose a further threat to public health, safety and welfare;" 2) alluded to the "eleven different uses to which he could improve the land so as to maintain its market value;" 3) made reference to petitioner's Exhibits 11 and 12 annexed to the complaint involving the "high-rise apartments for the elderly which were approved were not objected to by nearby residents and probably would not significantly increase the traffic problem," and then concluded:

"These arguments alone are sufficient to render the validity of the P-O-C zoning ordinance 'fairly debatable' within the meaning of *Euclid v. Ambler Realty Co.*, 272 U.S. 365; 388.[3]" Appendix B, pp. 12a-13a.

The footnote to which the District Court made reference is the apparent authority for the venture outside the record *Ibid.* p. 13a.

Conclusion

For the reasons stated, a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit to review the judgment and decision of that Court affirming the order and decision of the District Court in favor of the respondents.

Respectfully submitted,

MAURICE A. GELLIS,
Petitioner Pro Se

Dated: April 17, 1972.

APPENDIX A

Order of Affirmance Without Opinion

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2800

MAURICE A. GELLIS,

Plaintiff-Appellant,

versus

CITY OF SAVANNAH, CHATHAM COUNTY, GEORGIA; J. CURTIS LEWIS, JR., Mayor, BENJAMIN M. GARFUNKEL, Mayor Pro Tem, W. T. GAUDRY, EDWARD A. PERKINS, J. M. STUBBS, and JOSEPH R. MYATT, Aldermen, CITY OF SAVANNAH, constituting the CITY COUNCIL, CITY OF SAVANNAH,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

(February 29, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

Order and Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. 2645
(Argued July 14, 1970 Filed July 9, 1971)

MAURICE A. GELLIS, Plaintiff

vs.

CITY OF SAVANNAH, CHATHAM COUNTY, GEORGIA;
CURTIS LEWIS, JR., MAYOR;
BENJAMIN M. GARFUNKEL, MAYOR PRO TEM;
W.T. GAUDRY, EDWARD A. PERKINS,
J.M. STUBBS and JOSEPH R. MYATT,
ALDERMEN CITY OF SAVANNAH,
Constituting the CITY COUNCIL, CITY OF SAVANNAH,
Defendants

ORDER

Plaintiff in this action was a prospective vendee of real property near Savannah on which he planned to erect two high-rise apartment buildings and one office building. He has been prevented from doing so by a local zoning ordinance and the interpretation thereof by the defendants. He seeks a declaratory judgment that the zoning ordinance is illegal, arbitrary and unreasonable in violation of the Fourteenth Amendment to the United States Constitution and that the denial of his petition for an amendment to the zoning ordinance is arbitrary, capricious and unreasonable in violation of 42 U.S.C. §§ 1983 and 1985. He also seeks $3,000,000 in damages from the individual defend-

ants on the ground that they have conspired to deny him of his civil rights under those sections.

Defendants filed an answer and motions to dismiss for failure to state a claim and also a motion for summary judgment. Plaintiff also filed a motion for summary judgment on the constitutional issue. Defendants' motion for summary judgment is accompanied by affidavits of the individual defendants and minutes of meetings before the Aldermen and the Zoning Commission and the Metropolitan Planning Commission. Plaintiff's showing consists primarily of his own sworn statements as to what took place at these meetings, the chain of events and his conclusions.

FACTS

The pleadings and affidavits show that the real property which is the subject of this suit consists of 7.42 acres of vacant, unimproved land bounded by Abercorn, Habersham, Stuart and Jackson Streets. It is in proximity of the residential subdivision known as "Habersham Woods."

As of March 22, 1962, the subject property and all adjacent land was zoned for one-family residential dwellings (R-6). Savannah City Code, Sec. 38-118 (f). The Habersham Woods subdivision had not been created or developed at this time.

On March 22, 1962, the Savannah Electric and Power Company purchased the 7.42 acres from J.C. Lewis Motor Company, Inc. for the purpose of erecting its general offices thereon. The sale was conditioned upon the vendor's obtaining the rezoning of the property to permit the construction of such office building. The zoning change was effectuated on May 16, 1962, despite the objection of the Metropolitan Planning Commission. It was zoned as "Planned Office Center District" (P-O-C). Savannah City Code § 38-122.2. Plaintiff alleges that this zone is peculiar to the subject property and that no other property is affected by such zoning classification.

The Savannah Electric and Power Company later decided to

construct its general offices downtown where it did. The property near Habersham Woods was never improved. It remained for sale until 1969.

On September 12, 1969, plaintiff entered into a conditional sales contract with Savannah Electric and Power Company for the purchase of the 7.42 acres. He wishes to build two 15-story apartment buildings and one multi-story office building. The P-O-C zoning ordinance did not expressly authorize high-rise apartments as one of the land "uses."[1] A condition to the sale was the obtaining by plaintiff of a zoning variance permitting high-rise apartments to be erected.

The sales contract between Savannah Electric and

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1. "11. USES PERMITTED: The following uses shall be permitted within a Planned Office Center District:

(1) Business and professional offices.

(2) Home appliance sales, when such sales are incidental to a business office operation.

(3) Pharmacy selling drugs and medical equipment and materials only, when such pharmacy is part of a center for medical and dental offices.

(4) Hospital or medical center.

(5) College or university.

(6) Homes for the aged and for children.

(7) Cultural center, including art gallery, legitimate theater, libraries and similar facilities.

(8) Signs, incidental.

(9) Signs, principal use. (The design and location of such signs shall conform to the approved development plan for the site.)

(10) Hall for conferences, meetings and educational programs.

(11) The use of public facilities or public parks for carnivals, rodeos, horse shows, shooting or athletic events, community fair or other events of public interest. (Such public facilities or public parks shall be owned and operated by either an agency of government or a unit of government). (5-9-62, § 1; 5-16-62, § 2)." Savannah City Code § 38-122.2 (11).

plaintiff provided that the six-month period for acquiring the zoning variance would be "extended automatically until a final determination is had on Purchaser's application in accordance with the Rules of Procedure of the Zoning Board of Appeals of the City of Savannah, adopted on February 25, 1969, as revised."

Paragraph eleven of the contract required plaintiff to give notice to Savannah Electric within seven days of a decision denying rezoning if he desired to use the property for general offices allowed by the P-O-C zoning ordinance. Paragraph two provides that all obligations of the purchaser are contingent upon his obtaining the zoning variance.

Plaintiff promptly requested the Metropolitan Planning Commission to review his site development plans for approval so that a building permit could be issued. There were a series of letters which indicated that residents of Habersham Woods would object to the proposed development and that apartments were not a "use" permitted by the P-O-C zoning ordinance.

On January 22, 1970, plaintiff appeared before a subcommittee of the Metropolitan Planning Commission seeking approval of his plans. It was pointed out to him that the P-O-C zoning prohibited the construction of apartments on the subject property.

On February 17, 1970, plaintiff presented his development plans to the full membership of the Metropolitan Planning Commission. This was a public hearing attended by the news media, residents of Habersham Woods and various city employees. Mr. John Simpson who was attorney for the protesting residents of Habersham Woods objected to plaintiff's plans on the ground that the residential privacy of Habersham Woods would be destroyed by the close proximity of the three high-rise buildings. Additionally, the Metropolitan Planning Commission considered the legal opinion of Thomas Mahoney, Assistant City Attorney, that luxury apartments was not a permitted use in a P-O-C zone. A resolution was adopted rejecting plaintiff's plans "for an

apartment and office complex within a P-O-C district as having no standing before this commission."

On Febrary 26, 1970, plaintiff petitioned the Mayor and Aldermen for an amendment to the P-O-C ordinance so as to permit apartments. The petition was referred to the Metropolitan Planning Commission for "review and recommendation." The Metropolitan Planning Commission staff recommended a denial of the petition, or in the alternative, a rezoning to R-I-P (Residential-Institutional-Professional) which would authorize the construction of the apartments. On March 24, 1970, the Metropolitan Planning Commission itself recommended denial of the petition.

Subsequently, on April 13, 1970, a conference was held in the Mayor's office. It was attended by the plaintiff, Mayor J. Curtis Lewis, Alderman Benjamin Garfunkel, City Manager Picot Floyd and his Assistant, Thomas Coffey, Jr. Mr. Gellis again presented his case.

On May 1, 1970, a meeting with the City Council was held. The prior meetings and actions taken were summarized. Mr. Simpson delivered a petition allegedly signed by seventy-two residents of Habersham Woods opposing the zoning amendment. He gave four additional reasons for denying plaintiff's petition, namely that (1) the buildings would interfere with Hunter Airfield flight patterns; (2) traffic problems would be created endanger the children who use the nearby Y.M.C.A.; (3) parking was inadequate; and (4) the P-O-C zoning ordinance did not permit apartments. Plaintiff sought to rebut these arguments. At the request of Mayor Lewis, thirty to forty citizens in the audience stood up to manifest their opposition to the petition. Only two persons were in favor. The petition for rezoning was denied. Shortly thereafter, this suit was filed.

The purpose of the "Planned Office Center District" ordinance, Savannah City Code § 38-122.2, "shall be to promote the development of large-scale planned office centers on suitable tracts of land, four acres or more in size, within the commun-

ity." An analysis of the eleven permitted uses indicates that the drafters contemplated professional offices which would serve the public such as medical or educational centers. No use permitted would normally require a high-rise building. "Family" apartments would be contrary to the purpose of promoting large-scale planned office centers. A high-rise apartment for families is a far cry from "Homes for the aged and children." An amendment to the ordinance would be necessary rather than a new construction of same by the authorities administering it.

Documentary evidence which appears in the motions shows that two high-rise apartment buildings for the elderly were approved recently in the same general area of the city. There were no objections by neighboring residents. Plaintiff alleges that Mayor Lewis owns practically all the land surrounding the subject property and that most of it is zoned for apartments.

LAW

The first question to be decided is whether Maurice Gellis is the "real party in interest" under Rule 17(a), F.R.C.P. to prosecute this action. If he is, then I must consider the issue of plaintiff's exhaustion of his administrative remedies before proceeding to the merits of the motions for summary judgement.

Defendants contend that since the conditional sales contract has expired and plaintiff suffered no damage thereunder, the issue is moot and he has not standing to sue. The conditional sales contract between Savannah Electric and plaintiff expired before the commencement of this suit since it was extended only until a "final determination" was had on the zoning variance application. However, the cause of action alleging constitutional deprivations arose prior to the expiration of the contract and may not be precluded by it.

Plaintiff characterizes the above defense as an attack upon "his capacity to sue" under Rule 17(b), F.R.C.P. and asserts that this defense is waived since it was not negatively averred as required by Rule 9(a). In *Wright, Law of Federal Courts* § 70

(2d ed., 1970) this defense is placed into perspective.

> "Though the two concepts are sometimes confused, there is a clear distinction between 'real party in interest,' governed by Rule 17(a), and 'capacity,' governed by Rule 17(b) and (c). A litigant could be the real party in interest and yet lack capacity to sue, as for example, a person who has become mentally incompetent. A person could have capacity to sue and yet not be the real party in interest, as for 'example a plaintiff who has assigned away all his interest in the claim before suit is brought'."

It would appear that only the holder of the legal title to real estate, the Savannah Electric and Power Company, could be the real party in interest in an action involving the zoning of its property. However, in *Avant v. Board of Adjustment*, 271 Ala. 600, 126 So 2d 100 (1960) a prospective vendee, such as Mr. Gellis, sought to have the zone changed from residential to business for a service station. The Court held that he was the proper plaintiff, reasoning that the agreement was not a mere option but was a contract to purchase conditioned upon the grant of a variance in the zoning ordinance, rendering the applicant (prospective vendee) the equitable owner of the property. Again, in *Board of Adjustment v. Procasco*, 69 Dauph Co. 204 (Pa., 1956) it was ruled that an equitable owner of real estate under a conditional contract of purchase stands in the same position as a legal owner in seeking a zoning variance. In 89 ALR2d 669 other cases are cited supporting the rule that a prospective vendee under a contract to purchase property to be affected by the granting of a zoning variance is usually held to be a proper party to appeal a denial thereof. I find that Maurice Gellis is the real party in interest in this action.

Defendants contend that plaintiff failed to apply for a building permit and file an appeal to the Zoning Board of Appeals after the adverse decision of the Metropolitan Planning Commission. This is without merit since Section 38-122.2 of the Savannah City Code provides that "Before a building permit is

the market value of the land which was suitable for commercial uses. The Supreme Court held that the question of whether a municipality can forbid a particular use of property depends on consideration of the property itself, the surrounding circumstances and the locality. *Euclid* at 387. Moreover, "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Euclid* at 388. The police power of the municipality can be invoked to prohibit the construction of apartments in "detached-house sections where it is used for the public health, safety, morals or general welfare of the community." *Euclid* at 391. Of particular interest in the case at bar is the court's statement in *Euclid* beginning at 394:

> "With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privileges of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would

be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

"If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

There has been a population shift to urban centers since 1926 making the zoning for apartments far more attractive and necessary than in the past. Even so, certain restrictions on the location and types of apartments are justified. An analysis of the facts in this case reveals that much of the area adjacent to the subject property and Habersham Woods is already commercialized. The vacant land near the property is zoned for apartments. The City recently approved two high-rise appartments for the elderly in or near residential areas considerably removed from the area. Plaintiff asserts that the subject property is the only P-O-C zoned property in the city.

In the area already commercially developed along Abercorn Extension there are no high-rise buildings which would lessen the privacy of the residents of Habersham Woods. The 450 apartment units would greatly increase the traffic, noise and pollution on Abercorn Street so as to pose a further threat to the public health, safety and welfare. Even if the P-O-C ordinance is confined to plaintiff's property, there are eleven different uses to which he could improve the land so as to maintain its market value. The high-rise apartments for the elderly which were approved were not objected to by nearby residents and probably would not significantly increase the traffic problem. These arguments alone are sufficient to render the validity of the P-O-C zoning ordinance "fairly debatable" within the meaning of *Euclid v. Ambler Realty Co.*, 272

U.S. 365, 388.[3]

Plaintiff relies heavily upon *Dailey v. City of Lawton, Okla.*, 296 F. Supp. 266, aff'd 425 F. 2d 1037, in which the refusal to rezone by the Metropolitan Area Planning Commission and the City Council denied Negroes and other minority groups their constitutional right to live in the proposed low-rent housing project. This case involves racial discrimination and for that reason is distinguishable from the case at bar. The only other factual situations found where zoning ordinances were set aside as arbitrary, void and unconstitutional were those that involved distances of proposed service stations from nearby churches and schools. See *Saar v. Town of Davie, Fla.*, 308 F. Supp. 207; *Thompson v. City of Miami, Fla.*, 417 F. 2d 1112. The validity of zoning ordinances was recently upheld where height restrictions were imposed (*City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 413 F. 2d 762); where property was rezoned from commercial to residential (*McCleskey v. Barrett*, 386 F. 2d 159) and where communal living was prohibited in a "single-family" zone (*Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908).

It is also contended that the P-O-C ordinance is "spot zoning" and is illegal. No federal cases were found. Spot zoning relates to "lifting out" of a zoned area, one unit or particular piece of property. *Birdsey v. Wesleyan College*, 211 Ga. 583 (1955). It is not unconstitutional per se (*Agnew v. Cruce*, 224 Ga. 216; *Bible v. Marra*, 226 Ga. 154) but is subject to close judicial scrutiny. *Orr v. Hapeville Realty Investments*, 211 Ga. 235, 85 SE2d 20; *Penning v. Owens*, 340 Mich. 355, 65 NW2d 831 (1954). The validity of such an ordinance depends on the particular circumstances of each case. *Christopher v. Matthews*, 362 Mo. 242,

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3. It was recently held that the decision of a zoning commission acting in a legislative capacity is not limited to the evidence in the record. *Gerstenfeld v. Jett*, 374 F.2d 333.

240 SW2d 934 (1951); *Page v. Portland*, 168 Or. 632, 165 P.2d 280 (1954); *Waxahachie v. Watkins*, 275 SW2d 477 (1955). It has been held that reasonable consideration should be given to the changing character of the district, if any. *Speakman v. Mayor & Council of North Plainfield*, 8 NJ250, 84 A.2d 715 (1951), *Morgan v. Banas*, 331 Mass. 694, 122 NE2d 369 (1954).

In 1962 most of the property east of Abercorn Street in the area of the subject property was vacant and was zoned for residential use. The character of the area was changing, however, for west of Abercorn the land was being commercially developed. Thus, the subject property was "lifted out" of this residential district by the P-O-C ordinance in order to build the general offices of the Savannah Electric and Power Company. As previously stated, Habersham Woods subdivision had not yet been created or developed. This "spot zoning" was not a denial of due process in light of the changing character of the neighborhood and the lack of injury to the health and welfare of the community.

In *Mestre v. City of Atlanta*, 255 F.2d 401, the Fifth Circuit, following *Gorieb v. Fox*, 274 U.S. 603, held that a federal court is bound to sustain an ordinance as constitutional if it cannot hold that the ordinance is clearly arbitrary and unreasonable and has no substantial relation to the public health, safety, morals or general welfare. I find that the P-O-C zoning ordinance is not arbitrary and unreasonable. Its application by defendants is a constitutional exercise of the City of Savannah's police power and does not constitute a taking or property without due process of law.

Plaintiff's contentions concerning the alleged conspiracy require a few words. Pursuant to constitutional authority (Ga. Code Ann. § 2-1923), the State granted zoning powers to all municipalities. See Code § 69-802. In the exercise of such powers the City Council and any other board or committee acts within their legislative capacity. *Morgan v. Thomas*, 207 Ga. 660; *Shellburne, Inc. v. New Castle County*, 293 F. Supp. 237.

Appendix B

In *Tenney v. Brandhove*, 341 U.S. 367 an investigating committee of the California legislature was sued under 42 U.S.C. § § 1983, 1985. The Supreme Court held that legislators were immune from liability under the Civil Rights Act where they were acting within the scope of their legislative duties. The court upheld the common law immunity of legislators to be free from arrest or civil process for what they do or say in legislative proceedings. "The claim of an unworthy purpose does not destroy the privilege." *Tenney*, 377.

In *Dombrowski v. Eastland*, 387 U.S. 82, a committee of the United States Senate was sued under the Civil Rights statutes for damages for seizure of plaintiff's property. The Court said at 84-85, "It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the speech or debate clause of the Constitution . . . that legislators engaged 'in the sphere of legitimate legislative activity' . . . should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." In *Pierson v. Ray*, 386 U.S. 547 the Supreme Court held that the Civil Rights Act was not intended to abolish settled principles of immunity which existed in common law.

The defendants in this case are charged under § 1985 of the Civil Rights Act with conspiring to deprive plaintiff of his property while acting in their legislative capacity. All have sworn by affidavit that they have neither conspired nor intended to conspire against plaintiff. Mr. Gellis seeks in his affidavit to refute defendants' statements by innuendo. This, of course, is not necessarily determinative of any factual issue. However, the record construed most favorably to plaintiff does not support a claim under § 1985 of conspiracy. To the contrary, it shows that defendants and other officials were within the bounds of discretionary authority as officers and employees of the municipality in interpreting and applying existing ordinances and in refusing the proposed amendment thereto.

The motion for summary judgment filed by the defendants

is granted and the complaint dismissed. Plaintiff's motion for a summary judgment is overruled.

This 9th day of July, 1971.

(s) ALEXANDER A. LAWRENCE
Chief Judge, United States District Court, Southern District of Georgia

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2800

D.C. Docket No. CA 2645
(Argued February 17, 1972 Decided February 29, 1972)

MAURICE A. GELLIS, Plaintiff-Appellant,

versus

CITY OF SAVANNAH, CHATHAM COUNTY, GEORGIA; J. CURTIS LEWIS, JR., Mayor, BENJAMIN M. GARFUNKEL, Mayor Pro Tem. W.T. GAUDRY, EDWARD A. PERKINS, J.M. STUBBS, and JOSEPH R. MYATT, Aldermen, CITY OF SAVANNAH, constituting the CITY COUNCIL, CITY OF SAVANNAH,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia
Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered

and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed:

It is further ordered that plaintiff-appellant pay to defendants appellees, the costs on appeal to be taxed by the Clerk of this Court.

February 29, 1972

Issued as Mandate:

APPENDIX D

Summary Judgment

Rule 56, Summary Judgment (F.R. C.P.), is as follows:

* * * * * * * * *

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * * * * * *

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admis-

sible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

A Standard State Zoning Enabling Act

"A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations," recommended by U.S. Department of Commerce, 1926.

Section 1. Grant of Power—For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes.

Section 2. Districts—For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of

buildings throughout each district, but the regulations in one district may differ from those in other districts.

Section 3. Purposes in View—Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

* * * * * * * * *

Section 7. Board of Adjustment.—

* * * * * * * * *

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer.

* * * * * * * * *

The board of adjustment shall have the following powers:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.
2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a liter-

al enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

* * * * * * * * *

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the board.

Georgia General Planning Enabling Act of 1957

Georgia General Planning Enabling Act of 1957, p. 420, *et seq.*, as amended, and as codified in Chapter 69-12, Planning Commission, Georgia Code Annotated, is as follows:

* * * * * * * * *

§ *69-1207.* Zoning: Grant of Power. For the purpose of promoting the health, safety, morals, convenience, order, prosperity, or general welfare of the municipality or county or both, the governing authorities of the municipality and county, respectively, are hereby empowered, the municipality within the corporate limits thereof, and the county within the unincorporated areas thereof, *in accordance with the conditions and the procedure specified in this Act,* to regulate the location, height, bulk, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density and distribution of populations, and the uses of buildings, structures, and land for trade, industry, residence, recreation, agriculture, forestry, conservation, water supply, sanitation, protection against floods, public activities, and other purposes. *Such regulations shall be made in accordance with a comprehensive plan* and shall be designed to lessen congestion in the streets; to secure safety

from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to promoting desirable living conditions and the sustained stability of neighborhoods, protecting property against blight and depreciation, securing economy in governmental expenditures, conserving the value of buildings, and encouraging the most appropriate use of land, other buildings and structures. (Italics supplied: Acts 1957, pp. 420, 425, as amended.)

cf. 69-802, Regulations to be made according to plan, etc. (Acts 1946, pp. 191, 192.)

* * * * * * * * *

§ *69-1203.* Planning Commission: Principal Powers and Duties.

It shall be the function and duty of the municipal planning commission, the county planning commission, or the municipal-county planning commission to make such careful and comprehensive surveys and studies of existing conditions and probable future developments and to prepare such plans for physical, social, and economic growth as will best promote the public health, safety, morals, convenience, prosperity, or the general welfare as well as efficiency and economy in the development of its political jurisdiction. In particular, the planning commission shall have the power and duty to:

1. Prepare a master plan or parts thereof for the development of its political jurisdiction.

(Acts 1957, pp. 420, 422; as amended.)

* * * * * * * * *

§ *69-1206.* Master Plan.

Appendix D

It shall be the duty of the municipal planning commission, or the municipal-county planning commission to make a master plan of its political jurisdiction and to perfect it from time to time. Such master plan may show, among other things; existing and proposed streets, highways, expressways, bridges, tunnels and viaducts and approaches thereto; routes of railroads and transit lines; terminals, ports, airports; parks, playgrounds, forests, reservations, and other public open spaces; sites for public buildings and structures; districts for residence, business, industry, recreation, agriculture, forestry; special districts for other purposes; limited development districts for purposes of conservation, water supply, sanitation, drainage, protection against floods, and the like; areas for housing developments, slum clearance, and urban renewal and redevelopment; location of public utilities whether publicly or privately owned, including but not limited to sewerage and water-supply systems; zoning districts, and other planning features, together with time and priority schedules and cost estimates for the accomplishment of the proposals. The master plan shall be based upon and include appropriate studies of the location and extent of present and anticipated population, social and economic resources and problems, and other useful data. Such plan may be adopted, added to, and changed from time to time, by a majority vote of the planning commission. It shall be a public record, but its purpose and effect shall be solely to aid the planning commission in the performance of its duties. (Acts 1957, pp. 420, 424.)

* * * * * * * * *

§ *69-1211.* Zoning: Board of Appeals.

The governing authority of the municipality or the governing authority of the county may each create a board of zoning appeals or they may create a joint board of appeals.

* * * * * * * * *

Appeals to the board of appeals may be taken by any person aggrieved or by any officer, department, board, or bureau of the

municipality or of county affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of appeals a notice of appeal specifying the ground thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

* * * * * * * * *

The board of appeals shall have the following powers:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any ordinance or resolution adopted pursuant to this Act.

* * * * * * * * *

§ *69-1211.1.* Zoning: Appeals from Decisions of Board of Zoning Appeals.

Any person or persons severally or jointly aggrieved by any decision of the Board of Zoning Appeals, may take an appeal to the Superior Court. Said appeal to the Superior Court shall be the same as an appeal to the Superior Court from any decision made by the Court of Ordinary and as specified in Chapter 6-2 of the Code of Georgia, except, however, that said appeal may be filed within thirty days from the date of the decision of the Board of Zoning Appeals, and upon failure to file said appeal within thirty days the said decision of the Board of Zoning Appeals shall be final. Provided, however, that on appeal said case shall be heard by the Judge of the Superior Court without a jury, unless one of the parties files a written demand for a jury trial within thirty days from the filing of the appeal. (Acts 1964, pp. 259-260.)

Appendix D

Savannah City Code (Zoning) Chapter 38-1

* * * * * * * *

§ *38-122.2* Planned Office Center District.

General requirements. The purpose of this district shall be to promote the development of large-scale planned office centers on suitable tracts of land, four acres or more in size, within the community. In addition to other considerations, a tract of land shall meet the following specific requirements before it shall be included within a Planned Office Center District:

a. The tract of land shall not be less than four acres in size and shall be in a single ownership.

b. The tract of land shall abut on a freeway, parkway, major arterial or secondary arterial as designated on the road classification map of the city.

c. The average depth of the tract of land measured from the abutting right of way line of a freeway, parkway, major arterial or secondary arterial shall be not less than two hundred fifty feet.

Development standards. Within a Planned Office Center District, the following development standards shall apply:

1. Development Plan Required. Before a building permit is issued for the development of a site within a Planned Office Center District, a development plan for such site shall be submitted to and approved by a committee of the metropolitan planning commission. In addition to the other development standards hereinafter set forth, this committee may establish such reasonable design requirements as it finds appropriate to accomplish the purposes of the zoning program. When a development plan for a site within a planned office center has been approved by the committee, it shall be certified to the zoning administrator. Building permits shall be issued only for improvements and developments on the site which conform to the approved development plan.

* * * * * * * * *

11. Uses Permitted: The following uses shall be permitted

within a Planned Office Center District:

(1) Business and professional offices.

(2) Home appliance sales, when such sales are incidental to a business office operation.

(3) Pharmacy selling drugs and medical equipment and materials only, when such pharmacy is part of a center for medical and dental offices.

(4) Hospital or medical center.

(5) College or university.

(6) Homes for the aged and for children.

(7) Cultural center, including art gallery, legitimate theater, libraries and similar facilities.

(8) Signs, incidental.

(9) Signs, principal use. (The design and location of such signs shall conform to the approved development plan for the site.)

(10) Hall for conferences, meetings and educational programs.

(11) The use of public facilities or public parks for carnivals, rodeos, horse shows, shooting or athletic events, community fair or other events of public interest. (Such public facilities or public parks shall be owned and operated by either an agency of government or a unit of government.) (5-9-62, § 1; 5-16-62, § 2.)

Editor's note.—The ordinance passed May 16, 1962, did not specifically permit the use contained in item (11) in Planned Office Center Districts; however, the ordinance stated that the use was permitted in all districts except P-S-C Districts. Consequently, it has been added to this section also.

* * * * * * * * *

§ *38-168.* Appeals.

(a) *Who may appeal.* Appeals to the board of appeals may be taken by any person aggrieved or by any officer, department, board or bureau of the governing authority affected by any decision of the zoning administrator.

APPENDIX E

Excerpts from Written Agreement dated March 22, 1962, between Savannah Electric and Power Co. and J.C. Lewis Motor Company, Inc., et al. (Exhibit 2, annexed to complaint):

"Subsequent to the consumation of this agreement and the delivery of the Warranty Deed as hereinbefore set forth, should first party elect to dispose of said property or use same for a purpose other than the erection of a general office and sales building thereon to be used in connection with its utility business, first party shall give written notice of such intention to second party prior to said disposal or other use.

* * * * * * * * *

Said option herein granted shall be null, void and non-exercisable upon first party using said premises for the purpose of erecting a general office and sales building, as aforesaid, or six (6) months after notice from first part to the second party of its intention to dispose of said property or use the same for other purposes and second party's failure to exercise this option.

* * * * * * * * *

But shall otherwise continue so long as said property is not used for said general office and sales building purpose in connection with the party of the first part's utility business. In any and all events, said option shall cease upon the death of J.C. Lewis, Jr. and all of his children now in life."

* * * * * * * * *

APPENDIX F

Affidavit of Robert F. Savadge in Opposition to petitioner's Motion and in Support of respondents' Motion for Summary Judgment to Dismiss Complaint.

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"17. Petitioner's contention that apartments should be permitted to be developed on subject property, because "homes for the aged and for children" are a permitted use, is not valid.

Appendix F

Homes for the aged and for children is a different use, as distinguished from conventional apartment uses, in that both the aged and children require different types of housing, supervision, traffic control and services, and in these and in other matters their needs differ from the needs of other citizens."

(Appendix Vol I, p. A-60
in Court of Appeals)

* * * * * * * *